

SERVICE DATE – MAY 6, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. EP 704 (Sub-No. 1)

REVIEW OF COMMODITY, BOXCAR, AND TOFC/COFC EXEMPTIONS

Decided: May 6, 2016

On March 23, 2016, the Board issued a notice of proposed rulemaking (NPRM) seeking public comment on its proposal to revoke the existing class exemptions under 49 C.F.R. Part 1039 for crushed or broken stone or rip rap, hydraulic cement, coke produced from coal, primary iron or steel products, and iron or steel scrap, wastes or tailings. The Board also invited interested parties to file comments regarding the possible revocation of other commodity class exemptions. The Board directed that comments on its NPRM be filed by May 27, 2016, and that replies to those comments be filed by June 27, 2016.

On April 8, 2016, the Association of American Railroads (AAR) filed a petition for release of information and a request for an extension of time. In its petition, AAR asserts that, because the Board's proposal in the NPRM "is the first instance in which the Board is seeking to reregulate commodities that had been previously exempted from regulation by the Interstate Commerce Commission" (ICC), AAR needs additional information to fully understand the evidence and the Board's rationale for its proposed rule. (AAR Pet. 1.) Thus, AAR requests the release of all data, reports, work papers, and other materials that underlie the proposed rule changes. (*Id.* at 2.) AAR requests the release of any other analyses, work papers, or materials related to the NPRM or regarding other commodities (including those where railroads may have lost market power over commodities that are currently regulated) that are not already publicly available in the record. (*Id.*) AAR also notes that, by letter sent to the Director of the Board's Office of Economics at the same time its petition was filed, AAR seeks release of data from the Carload Waybill Sample from 1987 through 2014. AAR states that, according to the NPRM, the Board's revocation proposal was based on, among other things, waybill rate data for years 1992 through 2013. (*Id.*) According to AAR, because the ICC did not rely on revenue-to-variable cost ratio comparisons in granting the exemptions for crushed stone and coke produced from coal, AAR seeks data for the years prior to 1993 so that it can make an apples-to-apples comparison between the data documented at the time the exemptions were granted and the present time. (*Id.* at 3.)

AAR also requests an extension of 60 days from the current due date for comments and replies or, alternatively, 60 days from the date of the release of the information AAR has requested, whichever is later. (*Id.*) According to AAR, this additional time is needed to allow interested stakeholders the ability to understand the Board's rationale and conduct the detailed

economic and market analysis necessary to consider a proposal to revoke a commodity exemption. (Id. at 3-4.) No party has filed comments opposing AAR's extension request.¹

By letter dated April 22, 2016, AAR's request for waybill rate data for years 1987 through 2014 was granted, under customary protective orders (see 49 C.F.R. § 1244.9), so that AAR may have the opportunity to conduct a thorough analysis of the Board's proposed rules.²

With respect to AAR's request in its petition for work papers, the public work paper that underlies the Board's proposed revocation of the class exemption for, specifically, crushed or broken stone or rip rap, hydraulic cement, coke produced from coal, primary iron or steel products, and iron or steel scrap, wastes or tailings will be made available on the Board's website.³ AAR's request for the release of all other data, reports, and other materials is properly addressed through the Board's Freedom of Information Act (FOIA) procedures.⁴ Thus, AAR's request for this information has been forwarded to the Board's FOIA office for review.⁵

¹ On April 21, 2016, the American Short Line and Regional Railroad Association (ASLRRRA) filed a letter asserting that it fully supports the AAR's petition for release of information and request for extension of time. By letter filed on April 27, 2016, the Institute of Scrap Recycling Industries (ISRI) asserted that, to the extent that the Board grants AAR's request and releases analyses, supporting data, and work papers pertaining to the Board's proposal to revoke the class exemption for iron and steel scrap, it seeks access to the same information. The American Forest & Paper Association (AF&PA) also filed a letter on April 27, 2016, asserting that it supports AAR's request for an extension of time. In addition, the AF&PA requests the release of any analyses, studies, work papers, data, and other information, reviewed by the Board, with respect to the paper and forest products exemptions. On April 29, 2016, the Portland Cement Association (PCA) filed a letter requesting a 60-day extension of time to file initial comments.

² Other interested parties to this proceeding (including, but not limited to, ASLRRRA, ISRI, AF&PA, and PCA) may seek access to the Carload Waybill Sample data for years 1987 through 2014 through the Board's procedures at 49 C.F.R. § 1244.9.

³ The work paper will be accessible by visiting the Board's website at www.stb.dot.gov. On the Board's homepage, select Industry Data/Economic Data/EP 704 (Sub-No. 1).

⁴ In its petition, AAR asserts that its request for the release of information would, among other things, aid in the development of the record and is consistent with AAR's rights under the FOIA.

⁵ Pursuant to the FOIA, an agency may make publicly available records that have been released to any person and that the agency determines have become or are likely to become the subject of subsequent, similar requests. See 5 U.S.C. § 552(a)(2)(D). Any documents released in response to AAR's FOIA request will, if appropriate, be placed on the Board's website to

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Finally, in light of the foregoing, a 60-day extension of the current comment deadlines is reasonable. Therefore, the deadline to file comments will be extended 60 days to July 26, 2016, and the deadline for replies will be extended 60 days to August 26, 2016.

It is ordered:

1. AAR's request for release of information is granted in part, as described above.
2. The deadline for initial comments is extended 60 days to July 26, 2016, and the deadline for replies is extended 60 days to August 26, 2016.
3. This decision is effective on the day of service.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

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permit prompt access by any interested party in this proceeding.